

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GALVESTER HOWARD JOHNSON,

Defendant-Appellant.

UNPUBLISHED

September 13, 2005

No. 255450

Kalamazoo Circuit Court

LC No. 03-001470-FC

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for two counts of armed robbery, MCL 750.529, and one count each of assault with a dangerous weapon, MCL 750.82, possession of a firearm by a felon, MCL 750.224f, carrying or possessing a firearm while committing or attempting to commit a felony, MCL 750.227b, and obstructing a police officer, MCL 750.81d. We affirm.

I

Defendant first argues he was denied his due process right to a fair and impartial trial when the trial court granted the prosecution's motion to have defendant shackled during the trial. We disagree.

We review a trial court's decision to restrain a defendant for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). An abuse of discretion exists only where "'an unprejudiced person, considering the facts on which the trial court [relied], would find no justification or excuse for the ruling made.'" *People v McSwain*, 259 Mich App 654, 685; 676 NW2d 236 (2004), quoting *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

The Sixth and Fourteenth Amendments guarantee the right to a fair trial. *Holbrook v Flynn*, 475 US 560, 567; 106 S Ct 1340; 89 L Ed 2d 525 (1986). Central to this right "is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Id.*, quoting *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978). Because the shackling of a defendant during trial might affect the impartiality of the jury, *People v Dunn*, 446

Mich 409, 425 n 26; 521 NW2d 255 (1994), the right to a fair trial generally includes the right to be free of shackles during the trial. *Dixon, supra* at 404. However, this right is not absolute. *Holbrook, supra* at 568; *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). Instead, the trial court has discretion to permit restraints where necessary to prevent the escape of the defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial. *Dixon, supra* at 404. The decision to permit a defendant to be restrained must be made based on findings supported by record evidence. *Dunn, supra* at 425.

On the first day of trial, before the jury was seated, the trial court heard evidence regarding defendant's conduct. The prosecution provided the court with an inmate report concerning defendant's incarcerations during 1997, 1999, 2000, and 2001, which summarized more than ten incidents involving threatening and defiant behavior. In addition, the report detailed numerous incidents involving defendant during the period of incarceration leading up to the trial. These most recent incidents included: throwing urine, twice smearing his cell with feces, jamming his cell door lock with a bar of soap, agitating other prisoners, having to be restrained during a meeting with his attorney the day before trial, engaging in self-injurious behavior and threatening to kill officers. Furthermore, a deputy testified that on one occasion he was unable to take off defendant's cuffs because a piece of metal, later determined to be a paperclip, had been jammed into the cuffs. The deputy also testified that, based on this and defendant's other behaviors, two guards were always assigned to defendant's transport. Testimony also established that defendant had been placed in isolation because of these behaviors and was considered a flight risk. Finally, the trial court also took note that it had observed defendant make an obscene gesture to the spectators in the courtroom and that he was generally defiant of authority.

Based on the evidence presented, the trial court found defendant had a propensity toward violence, was an escape risk and was "unable to conform himself to accepted standards of behavior and is likely to detract from the dignity of the process. . ." Because of these findings, the trial court granted the prosecution's motion. In addition, the trial court ordered that, to the extent possible, precautions should be taken to obscure the restraints from the jury's view. Given the evidence that defendant was dangerous to others and himself, a flight risk and engaged in inappropriate and disruptive behavior, see *Dixon, supra* at 404, we cannot conclude that the trial court was without justification for its decision to grant the prosecution's motion to restrain defendant during the trial. Hence, the trial court did not abuse its discretion.

II

Defendant next argues the trial court abused its discretion when it denied his request for substitute counsel. We disagree.

A trial court's decision on a defendant's motion for substitute counsel will not be disturbed absent an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

While an indigent defendant is not entitled to choose his lawyer, he or she may be entitled to have the assigned lawyer replaced for cause. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). Appointment of substitute counsel is warranted where "a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a

fundamental trial tactic.” *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991), citing *People v Charles O Williams*, 386 Mich 565; 194 NW2d 337 (1972). In determining whether to grant the request, the trial court may consider whether the appointment will unduly disrupt the trial process. *Mack, supra* at 14; see also *Charles O Williams, supra* at 577 (noting that the trial court may consider whether the request is merely a delaying tactic). Finally, the defendant must not be guilty of negligence in informing the court of his or her desire for different counsel. *Charles O Williams, supra* at 576.

Defendant requested substitute counsel immediately after the trial court ruled on the prosecution’s motion to have defendant restrained during trial. Defendant initially stated he wanted a new attorney because he and his attorney were not “agreeing upon the things we should agree upon.” Defendant explained that his attorney only met with him one time, never answered his letters and refused to file motions on his behalf. Defendant further stated, “I don’t feel that he’s doing his job like I feel he should do his job.”

While defendant did state that he and his attorney did not agree upon some matters, he failed to specify what those matters were with the exception of his trial counsel’s failure to file a speedy trial motion, which is insufficient to establish good cause for the substitution of counsel. See *Traylor, supra* at 463. Furthermore, in response to defendant’s allegations, defendant’s counsel stated that he met with defendant several times, but that, with the exception of one visit, the visits were “through bars.” Likewise, the prosecutor stated that defendant’s counsel had met with her and appeared in court, chambers or conference several times and seemed aware of the issues and well prepared for trial. The trial court also recognized defendant’s trial counsel’s longstanding membership in the legal community and his “incredible trial experience,” and expressed doubt that defendant’s allegations were true. Finally, the trial court noted that defendant had neglected to inform the court of his dissatisfaction until the day trial was to begin. Based on this record, we cannot conclude that the trial court abused its discretion in refusing to grant defendant’s request for substitute counsel.

Defendant also suggests that his counsel was ineffective for the same reasons upon which he claims the trial court should have granted his request for substitute counsel. However, we decline to address this issue because it was not properly set forth in defendant’s statement of questions presented, *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999), and was inadequately briefed and, therefore, abandoned on appeal, *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

III

Because the trial court granted the prosecution’s request to restrain defendant during the trial based on findings supported by the record, the trial court did not abuse its discretion. Likewise, the trial court properly determined that defendant failed to establish good cause for the

substitution of new counsel on the first day set for trial. Therefore, there were no errors warranting reversal.

Affirmed.

/s/ Michael R. Smolenski

/s/ William B. Murphy

/s/ Alton T. Davis